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In The Supreme Court of The United States

OCTOBER TERM, 1948

No. ~~11~~ **92**

H. P. HOOD & SONS, INC., PETITIONER

**C. CHESTER DEMOND, COMMISSIONER OF
AGRICULTURE AND MARKETS OF THE
STATE OF NEW YORK**

**PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT FOR THE COUNTY
OF ALBANY, STATE OF NEW YORK**

WARREN F. FARR,
Counsel for Petitioner

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In The Supreme Court of The United States

OCTOBER TERM, 1947

No.

H. P. HOOD & SONS, INC., PETITIONER

v.

**C. CHESTER DeMOND, COMMISSIONER OF
AGRICULTURE AND MARKETS OF THE
STATE OF NEW YORK**

**PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT FOR THE COUNTY
OF ALBANY, STATE OF NEW YORK**

The petitioner, H. P. Hood & Sons, Inc., prays that a writ of certiorari-issue to review the judgment entered in the above cause by the Supreme Court for the County of Albany, State of New York, as directed by remittitur of the Court of Appeals of the State of New York.

OPINIONS BELOW

The opinion of the Court of Appeals, affirming an order of the Appellate Division of the Supreme Court, is reported in 297 N. Y. 209, 78 N. E. (2d) 476. The opinion of the Appellate Division is reported in 271 App. Div. 394, 66 N.Y. S. (2d) 732.

JURISDICTION

The judgment of the Supreme Court for the County of Albany was entered on March 18, 1948, as directed by remittitur from the Court of Appeals issued on March 12, 1948. The jurisdiction of this Court is invoked under

Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925. The judgment below, entered pursuant to remittitur from the highest court of the State, sustained an order of the Commissioner of Agriculture and Markets of New York, acting under Section 258-c of Article 21 of the Agriculture and Markets Law of that State, which denied the petitioner a license to engage as a milk dealer at Greenwich, New York in the interstate purchase and shipment of milk. The petitioner's claim that that order violated the Commerce Clause of the Constitution of the United States (Article I, Section 8, Clause 3) was overruled. The federal question was raised and passed upon below as follows: Proceedings to review the order, instituted by the petitioner in the Supreme Court of the State of New York, were transferred, without hearing, to the Appellate Division of that court (R. 3). In its petition for review (R. 7-13), the petitioner had alleged, *inter alia*, that the order was not in conformity with law and was illegal and improper (R. 11). In its brief before the Appellate Division, where the case was initially heard, it asserted its rights under the Commerce Clause (R. 149). The Appellate Division sustained the Commissioner's action in a *per curiam* opinion without referring to the federal question raised (R. 135-139). Leave to appeal to the Court of Appeals was applied for on the ground that the order contravened the Commerce Clause. Such leave was granted (R. 148). In response to a suggestion that the federal question had not been properly presented, the Court of Appeals held (R. 149):

"However, it was argued in petitioner's brief in the Appellate Division, and so is available to the appellant in this court (see *Jonge-Bloed v. Erie R.R. Co.*, 296 N.Y. 912)."

The court's opinion then fully considered the petitioner's contention that the order violated the Commerce Clause on the ground that it obstructed petitioner's right to pur-

chase and ship milk in interstate commerce (R. 150-151) and conflicted with federal law regulating interstate commerce in milk (R. 151-152). That contention was overruled. Since, as the Court of Appeals held, the federal question was properly raised, and since it was necessarily considered and decided, this Court has jurisdiction to review the decision on certiorari. *Whitfield v. Ohio*, 297 U.S. 431, 436; *Nickey v. Mississippi*, 292 U.S. 393, 394; *Home Insurance Company v. Dick*, 281 U.S. 397, 407. See *Charleston Federal Savings & Loan Association v. Alderson*, 324 U.S. 182, 185-186.

QUESTIONS PRESENTED

1. Whether a state order denying a license to purchase and ship milk in interstate commerce on the ground that such operations will tend to increase the costs of competing dealers and to divert supplies from local markets obstructs interstate commerce in violation of the Commerce Clause of the Constitution of the United States (Article I, Section 8, Clause 3).

2. Whether such an order conflicts with existing federal laws regulating the handling of milk in interstate commerce.

STATUTES INVOLVED

The pertinent provisions of the Agriculture and Markets Law of New York and of the Agricultural Marketing Agreement Act (c. 296, 50 Stat. 246) are set forth in the Appendix, *infra*, pp. 16-24.

STATEMENT

The petitioner, a Massachusetts corporation, is a milk dealer engaged in purchasing milk in the New England states and the State of New York, shipping it to Boston, Massachusetts, and selling it in the Boston market for fluid

consumption (R. 7, 24). The petitioner's purchases of milk in New York for shipment to Boston are subject to Federal Milk Order No. 4, as amended, issued under the Agricultural Marketing Agreement Act (Appendix, *infra*, p. 21), regulating the handling of milk sold in the Greater Boston marketing area (R. 47, 60-61, 151). Under the provisions of Section 257 of Article 21 of the Agriculture and Markets Law of New York (Appendix, *infra*, p. 16), no milk dealer may buy milk from producers, or deal in, handle, sell or distribute milk in New York, unless licensed to do so by the Commissioner of Agriculture and Markets. The petitioner is, and for some years has been, duly licensed to purchase milk from producers at its three plants in New York, at Eagle Bridge, Salem and Norfolk (R. 8, 17, 33, 114).

On January 30, 1946, the petitioner applied for an extension of its license to permit it to purchase milk from producers at an additional plant, formerly operated by another dealer, at Greenwich, New York (R. 116). A hearing on the application was held (R. 35-109), at which milk dealers competing with the petitioner in the vicinity of Greenwich strenuously opposed the extension (R. 69-109).¹ They complained that the petitioner was not subject to the same health regulations applicable to dealers selling in New York State (R. 64-65, 89, 92-94, 100) and suggested that the Federal Milk Order applicable to the Boston marketing area gave the petitioner a competitive advantage (R. 53, 93, 106-107). Evidence was introduced as to a temporary shortage of supply in the Troy market (R. 75-77, 87) and a substantial portion of the hearing was devoted to the objection that granting the extension would result in taking milk out of the state (R. 87, 89, 102-103, 105-107).

¹They included the Dairymen's League (R. 69), Sheffield Farms (R. 80), Middletown Milk & Cream Company (R. 82), Vermont Milk & Cream Company (R. 85), Washington and Rensselaer County Co-operative Association (R. 88), Gold Medal Farms, Inc. (R. 91) and General Ice Cream Company (R. 104)..

The Commissioner found that the business which the petitioner proposed to conduct at Greenwich, like its business at its other plants in New York, would consist merely of purchasing milk and shipping it in fluid form, without processing, directly to Boston, Massachusetts (R. 17-18, 39-42). He further found that the petitioner had had difficulty in complying with the requirements of the Board of Health of Boston, Massachusetts (in which city the milk was sold) with respect to cooling milk before shipment because of the inability of its existing plants to handle the volume of milk delivered to them (R. 17); that it proposed to divert to the plant at Greenwich milk deliveries of producers living in that vicinity who were currently delivering to its plants at Eagle Bridge and Salem (R. 17-18); that such producers would save hauling expense by making deliveries to the new plant (R. 18); and that the petitioner intended to "take on 20 or 30 new producers" at Greenwich in addition to those who might shift from its plants at Eagle Bridge and Salem (R. 18). He "concluded" that if producers currently delivering to competing dealers in the vicinity should shift to the petitioner's new plant, it would tend to reduce the volume of milk handled by such dealers and thus to increase their costs (R. 21). Further, if such a shift occurred, it would tend to deprive local markets of supplies needed during the short season (R. 21). For these reasons, he determined that the extension "would tend to a destructive competition in a market already adequately served and would not be in the public interest" (R. 21), and, therefore, denied the extension (R. 15, 21). Simultaneously, however, he renewed the petitioner's license so far as its existing business was concerned (R. 15, 21, 32, 33).

In proceedings to review the Commissioner's denial of the extension, the Appellate Division of the Supreme Court of New York sustained his determination (R. 138-139). On appeal, the Court of Appeals affirmed (R. 152),

holding that, on the basis of the Commissioner's conclusions that "petitioner's proposed new branch would have a tendency to draw customers and milk away from local markets and set up undesirable competition between petitioner and other dealers" (R. 151), the refusal to extend petitioner's license was a permissible regulation of interstate commerce, and that there was no conflict between the Commissioner's order and federal regulation of interstate commerce in milk (R. 152).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that a state may deny a license to purchase milk in interstate commerce and ship it out-of-state on the ground that such purchases and shipment would tend to increase the costs of competing dealers and to divert milk from local markets.

2. In holding that denial on such grounds of a license to purchase milk in interstate commerce and ship it out-of-state is not a violation of the Commerce Clause of the Constitution of the United States (Article I, Section 8, Clause 3).

3. In holding that an order denying a license to purchase milk in interstate commerce and ship it out-of-state on the ground that such purchases and shipment would tend to increase the costs of competing dealers and to divert milk from local markets does not conflict with the Agricultural Marketing Agreement Act and Federal Milk Order No. 4, as amended.

4. In holding that such an order is not a violation of the Commerce Clause of the Constitution of the United

States (Article I, Section 8, Clause 3) because in conflict with federal laws regulating interstate commerce in milk.

5. In holding that the findings and evidence on which the order of the Commissioner of Agriculture and Markets was based warranted denial of a license to purchase milk in interstate commerce and ship it out-of-state.

6. In sustaining the order of the Commissioner of Agriculture and Markets denying the petitioner's application for an extension of its license.

REASONS FOR GRANTING THE WRIT

1. In holding that a state may refuse to permit interstate purchases to be made in a particular marketing area in the State on the ground that such purchases would tend to draw supplies from that market and to set up undesirable competition with other dealers, the Court of Appeals has decided a federal question of substance in a manner not in conformity with decisions of this Court.

The petitioner's business, present and proposed, of purchasing milk in New York and shipping it directly to an out-of-state market is wholly interstate in character (*United States v. Rock Royal Co-operative, Inc.*, 307 U. S. 533, 568; *Currin v. Wallace*, 306 U. S. 1, 10; *Dahmke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, 290-291), and the Court of Appeals so held (R. 150). The Commissioner's order, therefore, is not a regulation of a local activity "imposed before any operation of interstate commerce occurs" (*Parker v. Brown*, 317 U. S. 341, 361), but restricts interstate commerce itself.

We do not contend that such interstate business is immune from the requirement of the New York statute (Sections 257-258j, Article 21, Agriculture and Markets Law, Appendix, *infra*, pp. 16-21) that milk dealers be licensed and bonded in order to prevent fraud and to secure honest

dealing and financial responsibility. *Robertson v. California*, 328 U. S. 440; *Milk Control Board v. Eisenberg Farm Products*, 306 U. S. 346. That the petitioner has complied with the requirements directed to that end, and has established its qualifications to carry on its business properly (see Section 258-c, Article 21, Agriculture and Markets Law, Appendix, *infra*, pp. 18-21), is evident from the renewal of its license to continue its existing business (R. 21, 28, 33-34). In denying an extension, the Commissioner's order goes further than to prevent fraudulent or unsound or unsafe activities. It limits interstate operations, not because of their harmful character, but because the normal consequences of competition may tend to prejudice other dealers and to deplete local supplies. Applicable decisions of this Court establish that lawful interstate trade may not be restricted for such reasons.

A state may not "suppress or mitigate the consequences of competition between the states" or "neutralize the economic consequences of free trade among the states." *Baldwin v. Seelig*, 294 U. S. 511, 522, 526. State regulation attempting or accomplishing such a result has been consistently invalidated. *Buck v. Kuykendall*, 267 U. S. 307; *George W. Bush & Sons Company v. Maloy*, 267 U. S. 317; *Baldwin v. Seelig*, 294 U. S. 511; *Hale v. Bimco Trading, Inc.*, 306 U. S. 375. Cf. *Foster-Fountain Packing Co. v. Haydel*, 278 U. S. 1. The *Buck* and *Bush Company* cases, *supra*, condemned state action strikingly similar to that of the Commissioner here. The *Buck* case involved a state statute prohibiting common carriers for hire from operating within the state without a certificate from the state Director of Public Works. Such a certificate was denied to a carrier who proposed to engage within the state exclusively in interstate commerce, on the ground that the territory in which the applicant proposed to operate was "already being adequately served." Overruling the contention that the state had the power to exclude unnecessary competing

carriers, the Court held that the statute as applied was a forbidden obstruction of interstate commerce. In the *Bush Company* case a similar state statute authorized denial of a permit to operate as a common carrier if the Public Service Commission "deems the granting of such permit prejudicial to the welfare and convenience of the public." A permit was refused to an interstate carrier, the Commission basing its refusal on the consideration "whether or not existing lines of transportation would be benefited or prejudiced and in this way the public interest affected" (267 U. S. at 324). As in the *Buck* case, the statute as thus applied was held to conflict with the Commerce Clause.

The denial of the petitioner's application for an extension falls squarely within the condemnation of these cases. The New York statute forbids the issuance of a license to extend an existing business unless the Commissioner is satisfied that it "will not tend to a destructive competition in a market already adequately served" and "is in the public interest." Acting under this statute, the Commissioner found that existing plants in the vicinity of Greenwich had capacity to handle more milk (R. 19, 20), and concluded that the petitioner's entrance into that territory might divert supplies from them and, by reducing the volume they handled, might tend to increase their costs of operation (R. 21). For this reason he determined that the petitioner's operations would "tend to a destructive competition" and would not be "in the public interest" (R. 21). In short, if a market is once "adequately served", newcomers must be excluded since they may acquire part of the available supply and thus affect the costs of those already in the field. As in the *Buck* and *Bush Company* cases, adequacy of existing service and prejudice to competing dealers is made the test of the right to engage in interstate commerce.

The Commissioner's further conclusion that "If applicant takes producers now delivering milk to local markets

such as Troy, it will have a tendency to deprive such markets of a supply needed during the short season" (R. 21), furnishes no better support for the order. State restraint of the interstate purchase and shipment of lawful articles of commerce cannot be justified on the ground that supplies are needed to satisfy local requirements. *Oklahoma v. Kansas Natural Gas Co.*, 221 U. S. 229; *Pennsylvania v. West Virginia*, 262 U. S. 553. Cf. *Foster-Fountain-Packing Co. v. Haydel*, 278 U. S. 1.

The situation with which the Commissioner's order is concerned, is not, as the opinion below suggests (R. 151), "essentially local". The petitioner's purchases of milk in New York are governed by Federal Milk Order No. 4, as amended (Title 7, Code of Federal Regulations, Part 904), issued under the Agricultural Marketing Agreement Act (Appendix, *infra*, pp. 21-24) (R. 47, 60-61, 151; see *H. P. Hood & Sons, Inc. v. United States*, 307 U. S. 588). The basic purpose of that Act, and of the several milk orders issued thereunder, in regulating the interstate and intra-state handling of milk, was to prevent the disruption of commerce in that commodity and to assure adequate supplies for metropolitan centers despite fluctuations in production and competition in the industry. See *United States v. Rock Royal Co-operative, Inc.*, 307 U. S. 533, 549-550. Cf. *United States v. Wrightwood Dairy Co.*, 315 U. S. 110; *Stark v. Wickard*, 321 U. S. 288. Because of its multi-state nature the milk industry could not be effectively regulated by isolated states. Cf. *Baldwin v. Seelig*, 294 U. S. 511; *Cloverleaf Butter Co. v. Patterson*, 315 U. S. 148, 167. Uniform regulation by the Federal Government was required. The problems with which the Commissioner's order deals are thus not matters of purely local concern, having such slight impact on the national commerce that Congress cannot adequately handle them (See, *e.g.*, *Parker v. Brown*, 317 U. S. 341, 362-363; *California v. Thompson*, 313 U. S. 109, 113). Nor does his action coincide with federal policy.

The federal scheme is to regulate prices to be paid producers and assure them a fair division of the fluid milk market in order to encourage interstate commerce in milk. See *United States v. Rock Royal Co-operative, Inc.*, 307 U. S. 533, 550. Congress has not authorized any proration or limitation of interstate commerce in that commodity, as it has in the case of other agricultural products. (See, e.g., *Wickard v. Filburn*, 317 U. S. 111; *Parker v. Brown*, 317 U. S. 346, 353). On the contrary, it has specifically provided (Agricultural Marketing Agreement Act, Section 8c(5)(G)):

"No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States."

The shortage in supply, which the Commissioner found to exist in the Troy market "during the last short season of October through January (1945-1946) (R. 19) extended throughout the State of New York (R. 105) and to other Eastern cities as well (R. 53, 88). Inadequacy of supply during the so-called "short season" is a recurrent phenomenon in metropolitan markets. Thus, the Market Administrator under Federal Milk Order No. 4, as amended, determined that the supply of milk available for the Greater Boston market, part of which comes from petitioner's plants in New York, was insufficient to meet the demand for fluid milk during the short season of 1946-1947 and of 1947-1948.² To meet such emergencies, federal regulation seeks to encourage the importation of milk from other sections. New York, going its own way, seeks to preserve milk

²Declaration of emergency October 11, 1946, (11 F.R. 12221, 12223), terminated January 20, 1947 (12 F.R. 489). Declaration of emergency October 29, 1947 (12 F.R. 7048) terminated March 4, 1948 (13 F.R. 1261).

for itself. Such action "by its necessary operation is a means of gaining a local benefit by throwing the attendant burdens on those without the state" (*South Carolina State Highway Department v. Barnwell Brothers, Inc.*, 303 U. S. 177, 186) and conflicts with the federal purpose.

Recognizing that a state may not prohibit lawful interstate trade, the opinion below answers that there is in fact no obstruction here, since "Petitioner, under its present, unenlarged license, may still buy, at its Eagle Bridge, Salem and Norfolk locations, as much milk as it can get and may send it where it will" (R. 151). The suggestion is, in effect, that by licensing a dealer to do an interstate business in a single locality, a state may deny him permission to operate any place else without thereby obstructing interstate commerce. Such an argument completely overlooks the realities of the petitioner's business. The Commissioner found that at its Eagle Bridge and Salem plants the petitioner was unable to handle the volume adequately because of difficulty in cooling it in conformity with the requirements of the Boston Board of Health (R. 17). That was the reason that the Greenwich license was sought (R. 40, 116). The petitioner's third plant, at Norfolk, as the opinion below points out, is "in another part of New York State, and serves a different area and a different group of milk producers" (R. 148). Freedom to buy "all the milk it can get" at existing plants does not meet the petitioner's need to buy and ship at Greenwich. Moreover, if, as is suggested, there is no legal or practical obstacle to the petitioner's purchasing milk produced in the Greenwich area, provided delivery is made at petitioner's existing plants, the alleged justification for the order completely disappears. The State cannot have it both ways: that protection of local dealers and consumers makes it necessary to prevent diversion of milk from the Greenwich area, and yet that the petitioner is free, legally and in fact, to purchase and ship all the Greenwich milk it wants.

Milk Control Board v. Eisenberg Farm Products, 306 U.S. 346, on which the Court of Appeals relies, furnishes no support for its holding. In that case a Pennsylvania statute, requiring milk dealers to obtain a license, file a surety bond and pay producers a minimum price, was sustained as applied to a dealer whose purchases were wholly interstate. That statute did not prevent any milk dealer from making purchases where and to the extent he pleased if the required bond were filed and producers were paid the minimum price. As this Court pointed out (at p. 352): "The Commonwealth does not essay to regulate, or to restrain the shipment of the respondent's milk to New York." But denial of the right to purchase and ship at Greenwich is just such a restraint. The *Eisenberg* case sustained a regulation of the conditions on which interstate purchases could be made, not a refusal, as here, to let them be made. The distinction is plain. In *Robertson v. California*, 328 U.S. 440, 460, in holding that the state could exclude out-of-state insurance companies and their representatives if they did not meet the state's requirements for minimum reserves, this Court observed: "Their remedy is not to destroy the regulatory reserve conditions, but to comply with them." Here the petitioner has no such remedy. It is excluded from the Greenwich market, not because of the nature of its business, but because that market is "already adequately served" and local supplies have been short.

The question whether such exclusion is forbidden by the Commerce Clause is one of substance. Only a single plant is involved in the present controversy. But the ground on which a license to purchase milk at that plant is denied would preclude the petitioner and other milk dealers from obtaining a license to engage in interstate purchases in any area of the state where competing businesses or local consumers might be prejudiced.

2. The holding that there is no conflict between the Commissioner's order and federal laws regulating interstate handling of milk rests on a misconception of *Milk Control Board v. Eisenberg Farm Products*, 306 U.S. 346, and is not in accord with applicable decisions of this Court. In the *Eisenberg* case no question of conflict was raised. As this Court said (at p. 351):

"The question for decision is whether, *in the absence of federal regulation*, the enforcement of the statute is prohibited by Article I, §8 of the Constitution." (Italics supplied.)

Moreover, the distinction between the type of regulation involved in the *Eisenberg* case and the Commissioner's order is plain. We do not urge that all provisions of New York's Agricultural and Markets Law with respect to licensing milk dealers are precluded by federal regulation. A local requirement that dealers be honest and responsible is not incompatible with federal policy. But the refusal of a license because interstate purchases of milk may prejudice competing dealers and diminish local supplies frustrates that policy. Through stabilizing the price and broadening the outlets for fluid milk, Congress sought to eliminate the dangers of cut-throat competition³ and to assure the distribution of an adequate supply of milk in interstate commerce. The Commissioner's order has a contrary effect. It limits producers' outlets to those dealers already in business in the Greenwich market; it deprives producers of the financial savings which would result from a shorter haul to the petitioner's proposed plant (R. 18); and it restricts the supply of milk available for distribution to markets outside New York. The order thus stands as an obstacle to the accomplishment of the full purposes and

³See also Section 8c(7) (A) of the Act authorizing the inclusion in milk orders of terms prohibiting unfair methods of competition.

objectives of federal regulation. As such, it is invalid under the Commerce Clause. *Hill v. Florida*, 325 U.S. 538; *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218; *Hines v. Davidson*, 312 U.S. 52.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

WARREN F. FARR

Counsel for Petitioner

APPENDIX

Article 21 of the Agriculture and Markets Law of New York:

§257. *Licenses to milk dealers.* No milk dealer shall buy milk from producers or others or deal in, handle, sell or distribute milk unless such dealer be duly licensed as provided in this article. It shall be unlawful for a milk dealer to buy milk from or sell milk to a milk dealer who is unlicensed, or in any way deal in or handle milk which he has reason to believe has previously been dealt in or handled in violation of the provisions of this chapter. The commissioner may by official order exempt from the license requirements provided by this article, milk dealers who purchase or handle milk in a total quantity not exceeding three thousand pounds in any month, and/or milk dealers selling milk in any quantity in markets of one thousand population or less. Stores and farmers (including individuals and partnerships but not corporations) selling not more than one hundred quarts daily average of milk on the farm where produced to consumers coming there for it shall be exempt from the license requirements provided by this article.

§258. *Application for license.* An applicant for a license to operate as a milk dealer shall file an application upon a blank prepared under authority of the commissioner. An applicant shall state such facts concerning his circumstances and the nature of the business to be conducted as in the opinion of the commissioner are necessary for the administration of this chapter. Such application shall be accompanied by the license fee required to be paid. The commissioner may classify licenses and may issue licenses to milk dealers to carry on a certain kind of business only, or limited to a particular city or village or to a particular market or markets in the state, and may specify the place or places where milk may be received from producers.

The license year shall commence on April first and end on March thirty first following. An application

must be duly made at least thirty days before the commencement of the license year by all milk dealers then doing business, except that for the license year ending March thirty-first, nineteen hundred thirty-five, application shall be duly made within thirty days after this article takes effect by all milk dealers then engaged in business.

§258-a. *License fees.* A milk dealer receiving, purchasing, handling or selling during any of the twelve calendar months immediately preceding the period for which the license is issued a daily average total quantity of milk not exceeding four thousand pounds shall pay a license fee of twenty-five dollars; and for each additional four thousands pounds of milk or fraction thereof received, purchased, handled or sold, the license fee shall be increased twenty dollars. In no event, however, shall a license fee in excess of five thousand dollars be required.

An applicant who has not previously engaged in such business shall pay the minimum license fee as provided herein for the type of business which he proposes to conduct. Any such applicant who during any calendar month of the first year covered by his license receives, purchases, handles or sells a greater volume of milk than that upon which the license fee paid by such milk dealer was based shall for each additional four thousand pounds of milk or fraction thereof pay an additional license fee of twenty dollars.

It is not the intent that milk utilized by the applicant or licensee or sold by him in the form of manufactured products shall be included in the determination of the amount of license fee, but the fluid milk equivalent of condensed or concentrated milk, except when sold in hermetically sealed cans, and/or of cream, shall be included in such determination. Sales by a milk dealer of milk outside of the state not involving the receipt or handling or distribution within the state shall not be included in the determination of the license fee.

The commissioner may, by rule or order, provide for licensing, at any rate of license fee less than the

rates herein fixed, any milk dealer or class of milk dealers, generally or in a particular market, which he is authorized to exempt from license requirements.

A milk dealer who is a broker and who handles no milk physically and a milk dealer who neither buys nor sells milk but who operates a plant in which milk is pasteurized, processed or handled shall pay a license fee of twenty-five dollars.

A milk dealer which is a producers' bargaining and collecting co-operative and does not operate milk plants shall pay a license fee of twenty-five dollars.

A milk dealer receiving only milk utilized or sold in the form of manufactured products, other than condensed or concentrated milk, except when sold in hermetically sealed cans, and/or cream, shall pay a license fee of ten dollars.

§258-b. *Bonds and enforcement.*

1. Each milk dealer buying milk from producers for resale or manufacture or receiving milk from producers on consignment for the purpose of sale or manufacture, shall execute and file a bond, unless relieved therefrom as hereinafter provided. The bond shall be upon a form prescribed by the commissioner, shall be in the sum fixed by him, but not less than two thousand dollars, shall be executed by a surety company authorized to do business in this state, and shall be conditioned for the prompt payment of all amounts due to producers for milk sold by them to such licensee, during the license year. The bond shall be approved by the commissioner.

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§258-c. *Granting and revoking licenses.* No license shall be granted to a person not now engaged in business as a milk dealer except for the continuation of a now existing business, and no license shall be granted to authorize the extension of an existing business by the operation of an additional plant or other new or additional facility, unless the commissioner is

satisfied that the applicant is qualified by character, experience, financial responsibility and equipment to properly conduct the proposed business, that the issuance of the license will not tend to a destructive competition in a market already adequately served, and that the issuance of the license is in the public interest. The commissioner may decline to grant or renew a license or may suspend or revoke a license already granted, upon due notice and opportunity of hearing to the applicant or licensee, when he is satisfied of the existence of any of the following reasons:

(a) That a milk dealer has rejected, without reasonable cause, any milk purchased or has rejected without reasonable cause or reasonable advance notice, milk delivered in ordinary continuance of a previous course of dealing, except where contract has been lawfully terminated.

(b) That the milk dealer has failed to account and make payment without reasonable cause, for any milk purchased.

(c) That the milk dealer has committed any act injurious to the public health, public welfare, or to trade or commerce in demoralization of the price structure of pure milk to such an extent as to interfere with an ample supply thereof for the inhabitants of the state affected by this article which is hereby declared to be injurious to the public health, public welfare and to trade and commerce and evidence of a course of conduct on the part of the licensee tending to such demoralization shall be construed to be prima facie evidence of a violation of this section.

(d) Where the milk dealer is insolvent or has made a general assignment for the benefit of creditors or has been adjudged a bankrupt or where a money judgment has been secured against him, upon which an execution has been returned wholly or partly unsatisfied.

(e) Where the milk dealer has continued in a course of dealing of such a nature as to satisfy

the commissioner of his inability or unwillingness properly to conduct the business of receiving or selling milk or to satisfy the commissioner of his intent to deceive or defraud producers or consumers.

(f) Where the milk dealer has been a party to a combination to fix prices, contrary to law. A cooperative association of dairymen organized under or operated pursuant to the provisions of chapter seventy-seven of the consolidated laws and engaged in making collective sales or marketing for its members or shareholders of dairy products produced by its members or shareholders shall not be deemed or construed to be a conspiracy or combination in restraint of trade or an illegal monopoly nor shall the contracts, agreements, arrangements or combinations heretofore or hereafter made by such association, or the members, officers or directors thereof, in making such collective sales and marketing and prescribing the terms and conditions thereof, be deemed or construed to be conspiracies or to be injurious to public welfare, trade or commerce, if otherwise authorized by such chapter or law.

(g) Where there has been a failure either to keep records or to furnish the statements or information required by the commissioner.

(b) Where it is shown that any statement upon which the license was issued is or was false or misleading or deceitful in any particular.

(i) Where the applicant or licensee has been convicted of a felony.

(j) Where the applicant is a partnership or a corporation and any individuals holding any position or interest or power of control therein has previously been responsible in whole or in part for any act on account of which a license may be denied, suspended or revoked, pursuant to the provisions of this article.

(k) Where the milk dealer has violated any of the provisions of this chapter.

(l) Where the milk dealer has been duly required to give a bond or an additional bond and has failed to do so.

(m) Where the required permit from the local health officer has terminated or been revoked.

(n) Where the milk dealer has ceased to operate the milk business for which the license was issued.

The commissioner may grant or renew a license or may decline to suspend or revoke a license conditionally, or upon the agreement of the licensee or applicant to do or omit to do any definite act, but such condition and/or agreement must have some appropriate relation to the administration of this article.

Whenever a milk dealer's license is denied or revoked there shall be filed in the office of the division of milk control a memorandum by the director or by the person who presided at the hearing given to the applicant or licensee which memorandum shall briefly state the reasons for the denial or revocation of the license, but formal findings of fact shall not be required to be made or filed.

Agricultural Marketing Agreement Act of 1937 (c. 296, 50 Stat. 246), 7 U.S.C. §§601, *et seq.*

"Sec. 8c. (1) The Secretary of Agriculture shall, subject to the provisions of this section, issue and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity or product thereof, as is in the current of interstate or foreign

commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof."

"(2) Orders issued pursuant to this section shall be applicable only to the following agricultural commodities and the products thereof: (except products of naval stores and the products of honey-bees), or to any regional, or market classification of any such commodity or product: Milk, fruits (including pecans and walnuts but not including apples and not including fruits, other than olives, for canning), tobacco, vegetables (not including vegetables, other than asparagus, for canning), soybeans, hops, honey-bees and naval stores as included in sections 91 to 99 of this title and standards established thereunder (including refined or partially refined oleoresin)."

"(5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7)) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: *Provided*, That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered: subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler or by all handlers; among producers and associations of producers, on the basis of their marketings of milk during a representative period of time.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection (5), providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) hereof.

(E) Providing (i) except as to producers for whom such services are being rendered by a cooperative marketing association, qualified as provided in paragraph (F) of this subsection (5), for market information to producers and for the verification of weights, sampling, and testing of milk purchased from producers, and for making appropriate deductions therefor from payments to producers, and (ii) for assurance of, and security for, the payment by handlers for milk purchased.

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(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States."

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"(7) In the case of the agricultural commodities and the products thereof specified in subsection (2) orders shall contain one or more of the following terms and conditions:

(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

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